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In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLIANCE AGAINST IFQS, ET AL., PETITIONERS

v.

WILLIAM M. DALY, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, by reviewing the Secretary's adoption of fishery management regulations under an "arbitrary and capricious" standard, the court of appeals violated the Due Process Clause of the Fifth Amendment.

2. Whether the Secretary's regulations comport with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, and with the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 84 F.3d 343. The opinion of the district court (Pet. App. 36a-54a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. A petition for rehearing was denied on August 15, 1996. Pet. App. 55a-56a. The petition for a writ of certiorari was filed on November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.*, to protect the nation's fisheries from overfishing, which threatens the nation's food supply, health, and economy. 16 U.S.C. 1801(a)(1). The Magnuson Act authorizes the creation and enforcement of fishery management plans "to prevent overfishing, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. 1853(a)(1)(A). The plans must be consistent with seven national standards for fishery conservation and management. 16 U.S.C. 1851(a)(1)-(7). The Magnuson Act established eight regional fishery management councils, 16 U.S.C. 1852(a), which advise the Secretary of Commerce in the "preparation, monitoring, and revision" of fishery management plans. 16 U.S.C. 1801(b)(5).[1] The regional councils are accorded discretion in developing the fishery management plans. The plans may require fishing vessels to obtain permits, restrict certain types of fishing gear, establish catch limits, and limit access to a fishery. See 16 U.S.C. 1853(b). If a council chooses to limit access to a fishery, both the Secretary and the council must "take into account" six enumerated factors, including "present participation" in the fishery and historical fishing practices. 16 U.S.C. 1853(b)(6).[2]

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[1] The relevant regional council in this case is the North Pacific Fishery Management Council, which governs fishing in and around Alaska.

[2] Subsequent to the adoption of the fishery management plan at issue here, Congress placed a moratorium until October 1, 2000, on the adoption of any new programs that limit fishery

Once a regional council develops a plan, it is submitted, along with proposed implementing regulations, to the Secretary for review. 16 U.S.C. 1853(c). If the Secretary approves the plan, he also promulgates the necessary implementing regulations. 16 U.S.C. 1855(a). If the Secretary finds that the plan warrants further review, the Secretary must immediately initiate such review and publish a notice in the Federal Register soliciting written data, views, and comments on the plan. 16 U.S.C. 1854(a)(1)(B) and (C). The Secretary must "take into account" any data, views or comments received. 16 U.S.C. 1854(a)(2)(A).

b. The Northern Pacific Halibut Act of 1982 (Halibut Act), 16 U.S.C. 773 *et seq.*, authorizes the regional fishery management councils established under the Magnuson Act to develop regulations, including limited access regulations, governing halibut fishing in United States waters. 16 U.S.C. 773c(c). Regulations proposed by the regional councils may be implemented only with the approval of the Secretary following notice and comment rulemaking. *Ibid.*[3]

2. The 1980s witnessed a marked increase in sablefish and halibut fishing in Alaskan waters. See 58 Fed. Reg. 59,375, 59,376 (1993). The vigorous competition between commercial fishers resulted in numerous problems, such as excessive gear investment, waste of fish resources due to lost gear and extremely

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access by imposing individual fishing quotas. Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(e), 110 Stat. 3576-3577.

[3] The fishery for halibut in and off Alaska is also governed by regulations (50 C.F.R. Pt. 301) of the International Pacific Halibut Commission, developed pursuant to the 1953 Convention between the United States and Canada for the Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, as amended, Mar. 29, 1979, 32 U.S.T. 2483.

limited legal fishing seasons, and a consequent fluctuating supply of fresh fish for market. See Pet. App. 3a-4a.

In October 1992, the regional council submitted a fishery management plan to the Secretary for regulating sablefish and halibut fishing. The council proposed allocating individual fishing quotas (IFQs) among all owners and lessees of fishing vessels that legally fished for halibut and sablefish between 1988 and 1990. Pet. App. 5a; 58 Fed. Reg. 59,406 (1993) (codified at 50 C.F.R. 676.20(a)(1)).[4] The size of each individual's quota share would depend upon the volume of halibut and sablefish landed during specified years. Pet. App. 5a.[5] Qualified fishers not originally allocated a quota share under the plan could purchase a quota share from a holder of such a share.

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[4] IFQs are defined as "the annual catch limit of sablefish or halibut that may be harvested by a person who is lawfully allocated a harvest privilege [or quota share] for a specific portion of the total allowable catch of sablefish or halibut." 58 Fed. Reg. 59,403 (1993) (codified at 50 C.F.R. 676.11)). The annual allocation of IFQ to any person will be calculated by multiplying the total allowable catch of sablefish or halibut designated for an area by the ratio of that person's quota share to the total quota share available for that area. 58 Fed. Reg. at 59,407 (codified at 50 C.F.R. 676.20(f)(1)). In general, a person's total quota share represents that person's "share" of the fishery in an area, from which the person's individual annual catch limit (or IFQ) of sablefish and halibut, expressed in pounds, is calculated. Subject to limited exceptions, no person may retain an amount of sablefish or halibut harvested in excess of his or her IFQ. 58 Fed. Reg. at 59,405 (codified at 50 C.F.R. 676.16(d)).

[5] For sablefish, the base period is 1985-1990. For halibut, the base period is 1984-1990. 58 Fed. Reg. 59,406 (1993) (codified at 50 C.F.R. 676.20(b)).

In December 1992, the Secretary published a proposed rule implementing the council's IFQ program, and solicited public comment. 57 Fed. Reg. 57,130 (1992). In November 1993, the Secretary published a final rule approving the IFQ plan for sablefish and halibut and adopting implementing regulations. 58 Fed. Reg. 59,375 (1993).

3. Petitioners, the Alliance against IFQs and a number of individuals who were not assigned IFQs under the plan, filed suit challenging as arbitrary and capricious the Secretary's adoption of regulations implementing the plan. The district court granted the Secretary's motion for summary judgment and dismissed the case. Pet. App. 36a-54a. The court of appeals affirmed. *Id.* at 1a-33a. The court ruled that the decision to limit the allocation of IFQs to vessel owners and lease holders was reasonable both because of the need to curb excess capital investment in fishing and because of the practical difficulties in calculating and enforcing individual crew member shares. *Id.* at 21a-22a. The court of appeals also ruled that adopting 1990 as a cut-off date for measuring quota shares was reasonable to prevent excessive fishing efforts (aimed at boosting the final quota shares) during the time the plan was under consideration. *Id.* at 8a-11a.[6]

ARGUMENT

1. Petitioners contend (Pet. 9-12) that the court of appeals' review of the regulations under the arbitrary and capricious standard, rather than a stricter standard of review, denied them procedural due process

[6] The court of appeals rejected a number of other challenges to the regulations, none of which petitioners raise in their petition for certiorari.

because some of the members of the regional council have interests implicated by the fishery management plan. Petitioners, however, did not raise this constitutional argument below. Nor did either the district court or court of appeals address the question. Indeed, petitioners acknowledged below that the regulations were to be reviewed under the arbitrary and capricious standard, as required by the Magnuson Act, 16 U.S.C. 1855(f)(1), and case precedent. See Pet. App. 319a-320a; Knutsen Br. in Opp. App. 10a-12a. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).[7]

Review of this question would be inappropriate in any event. Application of the arbitrary and capricious standard of review in this context, as the statute prescribes, does not conflict with the decision of any other court of appeals. See *C & W Fish Co.* v. *Fox*, 931 F.2d 1556, 1562 (D.C. Cir. 1991) (citing additional cases).

Furthermore, petitioners' claim of unconstitutional bias is misplaced. The final decision under review is the decision of the Secretary, and petitioners make no argument that the Secretary suffered from any improper bias or conflict of interest. The court of appeals' deference to the Secretary's regulations thus in no sense deprived petitioners of an impartial deci-

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[7] Petitioners did ask the court of appeals to apply a fiduciary standard of review (Pet. App. 7a), but they did not claim that failure to do so would be unconstitutional. Also contrary to their position here, petitioners specified in the district court that they were not "suggest[ing] unprincipled behavior by the decision-makers." Knutsen Br. in Opp. App. 31a.

sionmaker. Cf. *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (discussing constitutional protection against a "biased decisionmaker").

That the Secretary was advised by persons, some of whom allegedly had affected interests, raises no issue of constitutional dimension. Quite the opposite, Congress expressly mandated in the Magnuson Act that the regional councils advising the Secretary consist of persons "who, by reason of their occupational or other experience * * * are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned." 16 U.S.C. 1852(b)(2)(A). Because the underlying proceeding involved general rulemaking, rather than an individualized administrative adjudication, the notice-and-comment rulemaking process and the availability of judicial review under the Administrative Procedure Act provided petitioners all the process they were due. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538-549 (1978). Further review is therefore not warranted.

2. a. Petitioners argue (Pet. 13-19) that, in distributing the initial quota shares to vessel owners and lessees, while omitting crewmembers who had no financial investment in the vessel on which they served, the Secretary failed to allocate shares in a fashion that is "fair and equitable to all such fishermen," as required by both the Magnuson Act, 16 U.S.C. 1851(a)(4)(A), and the Halibut Act, 16 U.S.C. 773c(c).

As the court of appeals recognized, the requirement of a fair and equitable allocation is only one of seven distinct factors the Secretary must weigh in adopting

a fishery management plan that accomplishes the goals of conservation and the efficient and productive use of environmental resources. Pet. App. 17a-20a. Because "[t]here is a necessary tension, perhaps inconsistency, among these objectives," no single factor can dictate a plan's content. *Id.* at 19a. Rather, the Secretary must balance the competing concerns and "each goal [may] be sacrificed to some extent to meeting the others." *Id.* at 20a. Because the Secretary considered the investment of "excess capital" into fishing boats and equipment to be one of the primary causes of overfishing, it was reasonable to limit the issuance of IFQs to vessel owners and lease holders, who are "the most directly involved persons in terms of capital investment." 58 Fed. Reg. 59,380 (1993); see also Pet. App. 21a-22a. Furthermore, the allocation of quota shares by vessel, rather than to individual fishermen, is more feasible to monitor and enforce. *Id.* at 21a (noting "the practical difficulties of documenting crew shares") (quoting 58 Fed. Reg. 59,386 (1993)).

b. The court of appeals also correctly rejected petitioners' argument (Pet. 19-22) that the Secretary failed to consider the fishermen's "present participation" in the fishery when allocating the IFQs. When adopting a plan that limits access to a fishery, the Secretary is required by both the Magnuson Act and the Halibut Act to "take into account" six factors, including "present participation in the fishery." 16 U.S.C. 1853(b)(6); 16 U.S.C. 773c(c).[8] The Secretary

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[8] For purposes of Section 1853(b)(6), "take into account" means that the factors are to be "considered." H.R. Rep. No. 445, 94th Cong., 1st Sess. 66 (1975); see also 50 C.F.R. 602.15(c)(2).

chose 1990 as the cut-off date for demonstrating "present participation" in the fishery and, thus, an entitlement to an IFQ.

Petitioners concede that some cut-off date is necessary (Pet. 21), but argue that the year 1990 did not reflect "present" participation by the time the Secretary's final rule was adopted in 1993. The Secretary, however, chose the 1990 cut-off because basing quota share allocations on prospective participation in 1992 and 1993, while the fishery management plan was under active consideration, would have promoted entry into the fisheries by new participants and encouraged all participants to intensify the already excessive race for fish to maximize their potential quota shares. 58 Fed. Reg. 59,386 (1993); see also 58 Fed. Reg. at 59,380. Thus, as the court of appeals recognized, the cut-off date reflected a desire not "to exacerbate overcapacity in the fishery by allowing speculative fishing in that year and subsequent years to qualify for an initial allocation of [quota share]." Pet. App. 12a.[9]

Finally, because the court of appeals' decision is in accord with the decisions of other courts of appeals, see *C & W Fish*, 931 F.2d at 1563-1564, and because the questions of how quota shares should be allocated and what cut-off date should be selected are narrow inquiries that present no issue of broad importance, further review is not warranted.

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[9] Petitioners correctly note that the Secretary's action exceeded the timeframes established by the Magnuson Act. Petitioners do not contend, however, that this delay deprived the Secretary of power to adopt this IFQ plan. See Pet. App. 13a; see also *Brock* v. *Pierce County*, 476 U.S. 253, 259-262 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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